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No. 80-2022

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ARDEN MAYS MERCKLE,
Petitioner,

vs.

JACK R. HARPER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, JACK R. HARPER, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD THIS COURT EXERCISE ITS DISCRETIONARY CERTIORARI JURISDICTION TO REVIEW THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DETERMINATION THAT PETITIONER'S ACTIONS WERE NOT "JUDICIAL ACTIONS" FOR THE PURPOSES OF JUDICIAL IMMUNITY, UNDER THE STANDARD SET FORTH IN *STUMP v. SPARKMAN*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), WHERE PETITIONER, IN HOLDING RESPONDENT IN "CONTEMPT" FOR REFUSING TO BE SWORN, ACTED OUT OF PERSONAL MOTIVATION BY INJECTING HIMSELF INTO A PRIVATE CONVERSATION WHERE RESPONDENT HAD NOT APPROACHED THE PETITIONER IN HIS JUDICIAL CAPACITY OR OTHERWISE?

II.

ALTERNATIVELY, IS THE PETITIONER, A FLORIDA COUNTY JUDGE, ENTITLED TO JUDICIAL IMMUNITY FROM SUIT FOR HOLDING RESPONDENT IN CONTEMPT FOR REFUSING TO BE SWORN TO ANSWER QUESTIONS, OUTSIDE OF ANY JUDICIAL PROCEEDING, WHICH ACTION PETITIONER THOUGHT WOULD AID RESPONDENT'S EX-WIFE AND HER ATTORNEY IN A SUPPOSED ACTION TO ENFORCE SUPPORT PAYMENTS UNDER A PRIOR DISSOLUTION OF MARRIAGE DECREE WHERE SUBJECT MATTER JURISDICTION OF MARRIAGE DISSOLUTION DECREES AND ENFORCEMENT OF SUPPORT WAS VESTED EXCLUSIVELY IN THE CIRCUIT COURTS OF FLORIDA?

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STATUTES AND CONSTITUTIONAL PROVISIONS

This Brief in Opposition addresses the additional question of the Petitioner's subject matter jurisdiction for the purposes of judicial immunity, which issue was rendered moot because of the basis of the Fifth Circuit's Opinion below. *Harper v. Merckle*, 638 F.2d at 848, 858, n. 16 (5th Cir. 1981). Consideration of this alternative basis for denial of the Petition requires reference to the following provisions of the Florida Constitution and the Florida Statutes (1973), contained in the Appendix to this Brief: Article V, §§5(b) and 6(b), Constitution of the State of Florida; §26.012(2)(c), Florida Statutes (1973); §61.011, Florida Statutes (1973); §61.043, Florida Statutes (1973); §61.13, Florida Statutes (1973); §61.14, Florida Statutes (1973); §61.17, Florida Statutes (1973).

STATEMENT OF THE CASE

Course of Proceedings Below[1]

Respo lent Jack R. Harper's ("Harper") Complaint of August 8, 1975 (R. 1), alleged that Petitioner, Judge Arden Mays Merckle, ("Merckle") violated Harper's protected rights under Title 42, U.S.C. §1983, when, on August 16, 1974, he incarcerated Harper immediately following a "contempt" proceeding.

Merckle moved to dismiss the Complaint on grounds of judicial immunity (R. 3), which motion was denied. (R. 9). Merckle filed his answer and affirmative defenses (R. 11) and the case proceeded to trial following pre-trial order and stipulation. (R. 12, 15).

Following jury trial before the Honorable George C. Young, Chief Judge of the United States District Court, Middle District of Florida, a Verdict on Special Interrogatories (R. 33-A; PA. D) was returned in favor of Merckle, and Judgment was entered thereon. (R. 34). Harper's Motion for New Trial (R. 36) was denied (R. 39), and Harper appealed to the Fifth Circuit on May 22, 1979. (R. 41).

The Fifth Circuit reversed the Judgment and remanded the case for a new trial, holding *inter alia*, that Merckle was not entitled to absolute judicial immunity, that his actions were otherwise illegal, and that Harper was entitled to a new trial on Merckle's affirmative defense theory of a qualified immunity as a "conservator of the peace" because of error in submission of

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1/ References are to the Record (R.) as paginated in the Court of Appeals. (PA.) = Appendices to Petition for Writ of Certiorari. (RA.) = Appendix to this Brief in Opposition. The trial transcript is in two volumes and is Record item 46, and will be referred to by volume and page number.

matters to the jury.[2] (PA. A). *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981). Merckle's Petition for Rehearing was denied on April 7, 1981. (PA. C).

Statement of the Facts

The Fifth Circuit's Opinion sets forth in detail the facts surrounding the Harper-Merckle confrontation, but omits additional facts and undisputed evidence (*Harper*, 638 F.2d at 852, n. 3) presented to the Circuit Court and relevant to this response.

Jack Harper came into the Hillsborough County Courthouse seeking his ex-wife, Patty, in order to pay her some $210.00 in child support entered in a dissolution of marriage proceeding which had occurred in Circuit Court in Polk County, Florida. Patty was secretary to the Honorable Harry Coe, Judge of the Circuit Court of Hillsborough County. Upon being unable to locate Patty, Harper went next door to the office of Judge Merckle who was a County Court Judge for Hillsborough County, Florida. He asked Barbara Bryant, Merckle's secretary, if she knew Patty and where she could be reached. Merckle was sitting in a chair in the outer office in street clothes and was not addressed by Harper. Merckle left and went into another office and reappeared a few minutes later. At that time, Harper was discussing the fact that he didn't know exactly how much he owed Patty and Merckle asked Bryant to go for the "Harper vs. Harper file," whereupon Merckle took a seat where Bryant had been sitting. (R. 46, I, p. 45).

Small talk ensued about college football and Bryant phoned to say she could not locate the "Harper vs. Harper

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2/ The New Trial for the purpose of the adjudication of the qualified immunity issue is not here at issue.

file."[3] Merckle looked at the check and asked where Harper lived. Harper stated ". . in Apartment 5E of Boca Grande Beach Club." Harper had also produced a business card with the same box address as on the check. At that point, Merckle immediately attempted to put Harper under oath, ostensibly to learn his "address," and Harper told him he would not swear to anything and that he was leaving. (R. 46, I, pp. 46-47). Harper exited the back door of the Courthouse and tried to reach Tony Gonzalez, an attorney and former fraternity brother. Merckle sent Bailiffs after Harper who pursued and apprehended him. (R. 46, I, p. 48-49).

Harper was escorted by the Bailiffs back to Merckle's office where other people were standing around, and Merckle sent for a court reporter. (R. 46, I, p. 49). Thereafter, Merckle proceeded with what the Court of Appeals described as a "rump" hearing (*Harper*, 638 F.2d at 851, n. 2), set forth at pages 852-853 of the Fifth Circuit's Opinion. (Petition, pp. 5-10). At this "hearing" Merckle stated the reasons for his actions:

> The whole basis of this hearing is whether or not you are in contempt of this Court for not remaining where you were.
>
> The Court at this time does hold you in contempt so anything you care to say Mr. Harper, before the Court imposes any sentence on you?
>
> * * *
>
> MR. HARPER: Now why is all this happening?
>
> THE COURT: Because you disobeyed a court rule.
>
> MR. HARPER: Where was the Court?
>
> THE COURT: Just take him out, Mr. Pinegar.

3/ There was no such file in Hillsborough County. (R. 15; *infra*, pp. 5-6). *Harper*, 638 F.2d at 850-851.

MR. HARPER: Where is the Court? I want an attorney man.

(638 F.2d at 853).

Harper remained incarcerated for three days in squalid conditions, then was paraded into Court in handcuffs, whereupon he was sentenced to three days in jail with credit given for the time already spent. This "conviction" was ultimately reversed on appeal to the Florida Circuit Court.

As stated by the Fifth Circuit (638 F.2d at 855-856), Merckle did not press the issue of absolute judicial immunity at trial. In fact, in the controlling pretrial stipulation (R. 15) the parties agreed:

A. That defendant as a county judge of Hillsborough County, Florida, on August 16, 1974, did not have jurisdiction over cases involving dissolution of marriage and child support and custody of children. Defendant, therefore, did not have jurisdiction over the case of In Re: The Marriage of Jack Ridley Harper, Husband, and Patricia Folsom Harper, Wife, No. 70-4600, which was then pending in the Circuit Court of Polk County, Florida.

B. That on August 16, 1974, there was no case pending before defendant as a county judge of Hillsborough County, Florida, in which the plaintiff was involved as party, witness or otherwise.

C. That plaintiff's visit to the office of the defendant on August 16, 1974, did not have anything to do with a case then pending before the defendant as a county judge of Hillsborough County, Florida.

D. The last order entered by the Circuit Court of Polk County, Florida, in Case No. 70-4600, In Re: The Marriage of Jack Ridley Harper, Husband, and Patricia Folsom Harper, Wife, was entered on July 2,

> 1974, ...and is entitled, 'Order Directing Domestic Relations Department to Close File'. There were no petitions or other matters pending before the Circuit Court of Polk County, Florida, in said case on August 16, 1974.

The Trial Court held that Merkle acted in the complete absence of jurisdiction. Merckle went to the Jury under a *qualified immunity* defense as a "conservator of the peace" claiming that he had authority under §901.01, Florida Statutes (1973), and Article V, §19, of the Constitution of the State of Florida[4] to arrest for misdemeanors committed in his presence, and that Harper's profanity violated §§847.04 and 847.05, Florida Statutes (1973) (public profanity - a misdemeanor), and that he acted in "good faith," even if illegally. (R. 15). This theory was embodied in Special Interrogatories 8-9 (638 F.2d at 855, n. 6), which the Jury never reached because of the erroneous submission of the issue of the "legality" of his action to the Jury. 638 F.2d at 860-861.

The parties agreed that absolute immunity was an issue of law for the Trial Court. The Trial Court specifically instructed the Jury that *had* Harper used profane language *in connection with any case pending before Merckle*, as a matter of law such language would constitute contemptuous conduct, and that Merckle would have absolute judicial immunity. The Trial Court additionally instructed the Jury, based upon Merckle's limited defenses as an alleged "conservator of the peace":

> Because the particular divorce case was not pending before Judge Merckle and because as a matter of law he *did not have jurisdiction* of that case, the law does *not afford to Judge Merckle the absolute judicial immunity* to which I have just referred. (Emphasis added).

4/ *Harper*, 638 F.2d at 860, n. 19.

> However, he is entitled to what is called qualified immunity for acts committed by him as a conservator of the peace provided certain requisites are met, which I will explain to you as I go along. (R. 35, p. 21).

The Jury was then instructed that Merckle was a "conservator of the peace" under Florida law and that he would be entitled to a qualified immunity *only*

> ...for acts committed by him in the sphere of that position provided that he acted in good faith and had a reasonable belief that his act was lawful. So his defense to the contention that he violated the civil rights of Jack Harper by incarcerating him on August 16, 1974 is that he was acting in good faith and had a reasonable belief that the imprisonment imposed upon — imposed by him was lawful. (R. 35, pp. 21-22).

The Jury was specifically instructed that when a judge, acting as a police officer or conservator of the peace, is a witness to a misdemeanor committed in his presence he is a prosecuting witness, and may not act as a judge of the offense, and that a hearing on the charge of direct contempt is not a trial of a misdemeanor and that only a judge, not a police officer, had authority to try a contempt committed in his presence, in a judicial matter properly pending before him. (R. 35, p. 27).

Merckle, in the pretrial stipulation (R. 15), had also alleged that *as a conservator of the peace*, and based on "recent information obtained from attorney Russell Peavyhouse; [Patty's attorney] Patricia Harper...and Barbara Bryant..." he had "probable cause" to believe that Harper had violated §856.04, Florida Statutes (1973), which relates to felony desertion or willful withholding of support. This "theory" was likewise not pressed to the Jury, and they were not instructed on this specific claim. However, Merckle admitted that he had no judicial

jurisdiction over any such violation of law, and stated that *he only could have arrested Harper.* (R. 46, I, p. 179-180). Merckle opined that he had "probable cause" to have Harper *arrested* "...like an ordinary police officer..." for willful failure to pay child support, but *he did not arrest* Harper. (R. 46, I, pp. 216-217). Merckle admitted that he never told Harper he had committed any crime because he wasn't going to arrest him and he did not mention it that day. (R. 46, I, pp. 234-235). Merckle maintained that he was holding "court," acting in a "judicial capacity," although he admitted he had no jurisdiction over anything involving Harper. (R. 46, I, pp. 235-236).

Merckle stated that he believed that anyone who walks into his judicial chambers "involves themselves with me." (R. 46, I, p. 181). As noted by the Court of Appeals' Opinion (638 F.2d at 851, n. 1) the transcript of the "rump" hearing (638 F.2d at 852-853) contains no reference either to the alleged use of profanity by Harper, or to any of the other "reasons" advanced by Merckle at trial for his actions. (*Supra*, pp. 4-5).

Merckle testified that Harper refused to be placed under oath and displayed violent filthy language before him. (R. 46, I. p. 163). A month later Merckle gave the FBI a statement and could not remember any specific profanities. (R. 46, I, pp. 163-170). According to Merckle he didn't *need* to state them at that time. (R. 46, I, p. 170). Later, Merckle changed his testimony to state that Harper did *not* use profane language before he tried to swear him in, only afterwards. (R. 46, I, pp. 176-177).[5] At another time, Merckle stated he sent the deputies after Harper for his contemptuous conduct in *leaving his office.* (R. 46, I, p. 177).

5/ The trial court in submitting Interrogatories 1-3, did so only under admonition to the Jury that they were for the *Court's* "informational purposes" only, (for determining the case, if required, after verdict) and did not pertain to the issues they were to decide as embodied in Interrogatories 4-7. (R. 46, II, p. 369; R. 35, p. 15). 638 F.2d at 855.

When asked what kind of judicial procedure he was engaged in, Merkle replied:

> A. I was acting as a judicial officer conducting judicial business.
>
> Q. And what was your judicial business, trying to find his address?
>
> A. Mr. Harper came in to my Chambers, Mr. Luckie, my Chambers. (R. 46, I, p. 177).

As ultimate justification for his actions, Merckle testified that he heard of Harper prior to August 1974, and heard that he was continually behind in his support payments, and that there were "orders to show cause by a court who had jurisdiction." (R. 46, I, pp. 209-210). Merckle also stated that he heard that Harper had engaged in "some type of criminal activity." (R. 46, I, p. 211).[6] According to Merckle he gained this information in several conversations between attorney Peavyhouse and Patty, and based upon those conversations he *thought* a summons was outstanding and that Harper could not be located. (R. 46, I, pp. 151, 213-215). 638 F.2d at 850-851, n. 1.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit in *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981), presents no basis for the exercise of this Court's discretionary certiorari jurisdiction. The Fifth Circuit has scrupulously applied this Court's decision in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), in determining that Merckle was not clothed with absolute judicial immunity because his actions in attempting to "swear" Harper, and in placing Harper in contempt for resisting, were not "judicial actions" under the narrow facts of this case. The Fifth Circuit's Opinion

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6/ There was no evidence of any of this at trial.

alone evidences that *Stump* presents a clear and cogent guide to judges in determining the limits of their authority in exercising their *judicial* powers. Neither valid social-judicial policy nor the administration of justice require alteration of the *Stump* criteria for determining whether or not actions constitute "judicial acts."

Harper clearly had not sought Merckle in his judicial capacity or otherwise. Thus, under no circumstances can Merckle use his own actions or intentions to "bootstrap" himself into a position of absolute judicial immunity in the misuse of the "contempt" power. Merckle injected himself into a private social circumstance totally and completely unrelated to any judicial business before him, or which could come before him, and acted out of personal motivation using his judicial office "...as an offensive weapon to vindicate personal objectives...." 638 F.2d at 859.

Although the Court of Appeals' decision obviated the necessity of determining the question of Merckle's subject matter jurisdiction, under the stipulated facts of this case and the law of Florida, it is clear that Judge Merckle did not have "jurisdiction" over any matter which would allow him to cloak his actions with the mantle of absolute judicial immunity. As a County Judge in Florida, Merckle had no jurisdiction over dissolution of marriage or support matters which rest exclusively in the jurisdiction of the Circuit Courts.

ARGUMENT

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DOES NOT MISAPPLY THIS COURT'S DECISION IN *STUMP v. SPARKMAN*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). MERCKLE'S ACTIONS, AS AN INTERLOPER INTO A PRIVATE AFFAIR, WERE NOT "JUDICIAL ACTS." MOREOVER, HE ACTED TOTALLY WITHOUT SUBJECT MATTER JURISDICTION AS A FLORIDA COUNTY JUDGE ATTEMPTING TO ACT IN A SUPPORT-DISSOLUTION OF MARRIAGE ACTION IN WHICH JURISDICTION LAY EXCLUSIVELY IN THE FLORIDA CIRCUIT COURTS.

Merckle's Petition loses sight of the fact that this Court does not exist as a "super" appellate court, nor are the United States Courts of Appeals to be utilized as mere way stops on the road to the Supreme Court.[7]

This case presents absolutely no question of the "relationship" between a state court's valid contempt power and the doctrine of absolute judicial immunity which is necessary to be resolved by this Court, as opined in the Petition. Rather, Merckle simply seeks another appeal, in the hope that he can convince this Court to change its prior decision which has been correctly applied to his factual situation. The Fifth Circuit has not misinterpreted or misapplied this Court's decision in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). To the contrary, in this "...the rarest of factual settings..." (638 F.2d 848, 859), the Fifth Circuit has properly applied the factors relied upon by this Court in *Stump*, 435 U.S. at 360-362, 55 L.Ed.2d at 341-343 in citing, approvingly, the Fifth Circuit's own decision in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972).

7/ See e.g., *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672, 677 (1948); *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1923).

The Petition presents no valid policy or other reasons for the exercise of this Court's discretionary jurisdiction. The Fifth Circuit's Opinion in this case is not the first in which it has properly dealt with and applied the *Stump* criteria.[8] Both *Crowe* and the Opinion here amply demonstrate that there is no present need to revisit *Stump* or to change the factors this Court has enunciated for the determination of whether or not a judge's actions constitute "judicial acts." The Fifth Circuit's Opinion in this case amply demonstrates that the judiciary is well able to differentiate between "judicial" actions and non-judicial actions under the *Stump* factors. Merckle's actions, having been found by the Court to be wholly personal and not judicial, under facts which are not subject to dispute, (638 F.2d at 859) present no basis for changing the *Stump* criteria as requested in the Petition.

The paucity of existing cases involving the abuse of the contempt power outside of *Stump's* already broad test for absolute immunity for judicial acts amply demonstrates that judges are not in need of any further instruction from this Court in order to be able to "...predict with any degree of certainty what is and what is not a judicial act." (Petition, p. 12). The *vast* majority of jurists will not even find the need to make such a prediction. Merckle's suggestion that this Court should entertain his Petition and eliminate the "second prong" of the *Stump* decision, in order to allow judges to exercise the raw power of "contempt" under absolute judicial immunity in any situation, is unaccompanied by any rationale which would demonstrate that such a course of action is necessary to, and would advance, legitimate concerns of society and the judiciary with respect to the administration of justice.

A. Merckle's Actions Were Not Judicial Acts.

8/ See: *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979).

Merckle's actions were not in furtherance of any judicial function. In attempting to "swear" Harper, and in holding him in contempt, Merckle injected himself into a purely private matter over which he stipulated that he had no "jurisdiction" as a County Court Judge in Hillsborough County. (R. 15; quoted, *supra*, p. 5). Harper did not come looking for any official or unofficial involvement with Merckle, but privately to pay his wife support money. This Court in *Stump* specifically referred to *McAlester*, with approval, and noted that a compelling factor supporting the immunity granted in *McAlester*, but *not* present here, was that

> '. . .the confrontation arose directly and immediately out of a visit to the judge in his official capacity. . . .'
>
> The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, *and to the expectations of the parties*, i.e., whether they dealt with the judge in his *official capacity*. (Emphasis added).
>
> [435 U.S. at 361-362; 55 L.Ed.2d at 342].[9]

Merckle's Petition recognizes the unambiguous criteria announced in *Stump*, and attempts to argue that the Fifth Circuit focused at the wrong "point in time" for determining Harper's "expectations" under the circumstances. (Petition, pp. 14-15). Merckle further "suggests" that the second criterion of the *Stump* factors should be eliminated. This suggestion arises from his realization that, in fact, Harper never sought any contact with Merckle, and that the Opinion sought to be reviewed is a correct application of law to fact.

Merckle's position that the Opinion focuses on the wrong moment in time is nothing more than an exercise in "boot-

9/ See also, *Crowe v. Lucas*, *supra*, n. 8.

strapping." In *McAlester*, the plaintiffs had gone to the courthouse where their son was awaiting trial to attempt to give him a fresh set of clothes. They entered the judge's office with the intent of learning when the trial was to start, thus, at least minimally, intentionally involving themselves with the judge in his judicial capacity. This element is wholly lacking in the present case. *Stump* requires that the courts look to Harper's expectation in dealing (or not) with Merckle, *not Merckle's intent in dealing with Harper*. It is specious to contend that Merckle's wrongful actions can change or affect Harper's expectation or intent in any manner, or at any time in this factual setting.

Here the seminal act was an officious attempt to swear Harper in hopes of getting his address for purposes of aiding Patty's lawyer in the service of a non-existant summons in a private domestic matter in which Merckle had no general or specific subject matter jurisdiction, and which in fact did not even exist at that point in time. (R. 15; *supra*, p. 6). 638 F.2d at 850-851, 854. In his Brief in the Fifth Circuit, (p. 10, n. 1) Merckle recognized that he had no authority to place Harper under oath.[10] By seeking to have this Court focus only upon the "contempt" hearing, Merckle admits the non-judicial character of his actions which led to his misuse of the raw power of "contempt." By injecting himself into a private affair totally beyond any possible official capacity he could have had as a County Judge, either specifically or generally, Merckle cannot "convert" non-judicial actions into judicial actions.

> The controversy that led to Harper's incarceration did not center around any matter 'then pending before the judge'; rather, it centered around the domestic problems of one of the Judge's friends, Harper's former

10/ The Jury, at their specific request during deliberations, was correctly instructed without objection, that "...there's no statute or legal right of Judge Merckle to require Jack Harper to be sworn to answer questions." (R. 35, p. 66).

> wife. These problems were brought to the Judge's attention in a social, not judicial, forum. Moreover, as the facts clearly establish, Harper did not visit Judge Merckle 'in his official capacity.' To the contrary, Harper sought only his former wife, whose office was adjacent to Judge Merckle's chambers, to settle his account with her.
>
> [638 F.2d at 859].

Merckle argues that because he was cursed by Harper, Merckle then had the power to place him in "contempt."[11] The Fifth Circuit rightfully rejected this feat of mental gymnastics. In cursing Merckle's attempt to swear him in the absence of any judicial or other authority, Harper in no sense was cursing a "judicial officer." Merckle himself admitted the limits of his supposed authority in his testimony to the Jury when he attempted to justify his actions as a "conservator of the peace," under his qualified immunity defense, by alleging that Harper had committed a "crime" by not paying the support money on time:

> Q. Well, that was a matter for some other judge than yourself to determine, wasn't it?
>
> A. That's right, but at that time, with that probable cause, I could have arrested him right then. I could not have tried him, no, sir, but another judge could have tried him to determine whether or not he was in fact then guilty of that felony.[12] (R. 46, I, pp. 179-180).

While the Fifth Circuit correctly found the use of contempt generally is a "normal judicial function" it also correctly found

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11/ Harper denied cursing. See, n. 5 *supra;* 638 F.2d at 851, n. 2.

12/ An assertion which Merckle ultimately abandoned. As found by the Fifth Circuit his actions under his "conservator of the peace" theory were clearly illegal although the "legality" of his actions do not govern the issue of judicial immunity.

that absence of the second prerequisite of *Stump*, (the fourth prerequisite of *McAlester;* quoted, *Harper*, 638 F.2d at 858) would not allow Merckle to vault into a position of absolute judicial immunity. To accept Merckle's proposition would be to allow judges to exercise the naked contempt "power" whenever and however they choose, neither accompanied by *any* rational restraints nor even remotely connected with their judicial function. This is a circumstance not envisioned by the policies underlying judicial immunity, or the proper administration of justice. 638 F.2d at 856.

At page 14 of his Petition, Merckle states that County Court Judges have general contempt jurisdiction by operation of §38.22, Florida Statutes (1973). While this is true, the Florida statutory definition of contempt is ignored:

> A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the *business of said court*, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt. (Emphasis added).
>
> [§38.23, Florida Statutes (1973)].

Here, Merckle's action in attempting to swear Harper and subsequently holding him in contempt for refusing to be sworn were not "judicial acts" under *Stump* although, in a proper setting, they are and would be normal "judicial functions."

B. Merckle Lacked Subject Matter Jurisdiction.

The Fifth Circuit's determination that Merckle's actions were not "judicial acts" obviated the necessity of that Court's determining whether Merckle had subject matter jurisdiction although footnote 16 of the Court's Opinion, at page 858,

clearly suggests that if required to do so the Fifth Circuit would find a lack of jurisdiction. As stated in *Bradley v. Fisher*, 13 Wall. 335, 80 U.S. 646, 651 (1871) and reaffirmed in *Stump:*

> Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

Although the Court here is involved with judicial immunity for the purposes of 42 U.S.C. §1983, it should be noted that the Supreme Court of Florida in *Farrish v. Smoot*, 58 So.2d 534, 538 (Fla. 1952), a successful false imprisonment action against a municipal judge, likewise recognized:

> 'A Judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his recognizance, or cases between persons who are not either actually or constructively, before him for the purpose.'

While it is recognized that the term "subject matter jurisdiction" must be given a broad interpretation, *Stump*, 435 U.S. at 357, 55 L.Ed.2d at 340; 638 F.2d at 858, n. 16, it cannot be stretched beyond logic to cover "contempt" powers exercised in the complete absence of judicial or judicially connected matters over which the judge is empowered to act. As asked by Harper at the "hearing," this case begs the question: *"[w]here was the Court"?* (*Supra*, p. 4).

Here the confrontation did not center around any case then pending before "Judge" Merckle, or any subject matter over

which he could have exercised any jurisdiction. The confrontation did not arise directly and immediately out of a visit to Merckle in his official capacity or *otherwise*. Merckle chose to interject himself into a private conversation concerning a personal matter having nothing to do with his judicial function, in an attempt to swear Harper to gain "evidence" with respect to a matter over which he not only stipulated he did not have jurisdiction (R. 15; *supra*, p. 6) but over which, as a matter of law, he could not have had jurisdiction. County Courts in the State of Florida have no jurisdiction over any matters relating to dissolution of marriage.[13]

If there ever was a clear case of lack of subject matter jurisdiction this is that case. Once again, Merckle cannot use his own act of attempting to swear Harper, for purposes of "aiding" his friend Patty Harper in a non-existent support action over which he did not and *could not* have had any subject matter jurisdiction, to bootstrap himself into "jurisdiction" over a rump "contempt" hearing inextricably flowing from that jurisdictionally void action. This is true whether one is concerned with jurisdiction and immunity under 42 U.S.C. §1983, or the valid exercise of contempt power as defined by §38.23, Florida Statutes (1973). (Quoted *supra*, p. 16).[14]

13/ Under Article V, §6(b), Florida Constitution (RA. 1) County Courts have jurisdiction as prescribed by general law. Under Article V, §5(b), Constitution of the State of Florida, the Circuit Courts have all original jurisdiction not vested in the County Courts. (RA. 1). Equity (Chancery) jurisdiction was (and still is) exclusively vested in the Circuit Courts under §26.012(2)(b), Florida Statutes (1973). (RA. 2). §61.011, Florida Statutes (1973) specifically provided that all matters involved in dissolution of marriage under Chapter 61, Florida Statutes "...are in chancery," (RA. 2). Thus, the Circuit Courts of Florida, and not the County Courts, are vested with all matters concerning dissolutions of marriage including the original action, support, enforcement, or modifications. §§61.043, .13, .14, and .17, Florida Statutes (1973). (RA. 2-6).

14/ The situation here is no different than the complete absence of jurisdiction inherent in a probate judge trying a criminal case. *Bradley v. Fisher*, *supra*, 80 U.S. at 651; *Harper*, 638 F.2d at 858, n. 16; *Crowe v. Lucas*, *supra*.

Harper respectfully submits that even the broadest construction of the concept of "subject matter jurisdiction" cannot and should not support the invocation of absolute judicial immunity in this case. The judiciary is not in need of a rule which would grant absolute judicial immunity under the unusual facts of this case.

CONCLUSION

The Petition for Writ of Certiorari presents no basis for the exercise of this Court's discretionary jurisdiction. The Fifth Circuit has scrupulously applied this Court's decision in *Stump*, in a factual situation which hopefully will never arise again. The Petition should be DENIED.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT,
JACK R. HARPER

NO. 80-2022

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ARDEN MAYS MERCKLE,

Petitioner,

vs.

JACK R. HARPER,

Respondent.

STATUTORY APPENDIX TO BRIEF FOR RESPONDENT, JACK R. HARPER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARTICLE V, §5(b), CONSTITUTION OF THE STATE OF FLORIDA

SECTION 5. Circuit courts.—

* * *

(b) JURISDICTION.—The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

ARTICLE V, §6(b), CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE 6. County courts.—

* * *

(b) JURISDICTION.—The county courts shall exercise the jurisdiction prescribed by general law. Such jurisdiction shall be uniform throughout the state.

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§26.012, FLORIDA STATUTES (1973)

26.012 Jurisdiction of circuit court.—

* * *

(2) They shall have exclusive original jurisdiction:

* * *

(c) In all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 39 and 316;

* * *

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§61.011, FLORIDA STATUTES (1973)

61.011 Dissolution in chancery.—Proceedings under this chapter are in chancery.

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§61.043, FLORIDA STATUTES (1973)

61.043 Commencement of a proceeding for dissolution of marriage.—A proceeding for dissolution of marriage or a proceeding under §61.09 shall be commenced by filing in the circuit court a petition entitled "In re the marriage of_____, husband, and_____, wife." A copy of the petition together with a copy of a summons shall be served upon the other party to the marriage in the same manner as service of papers in civil actions generally.

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§61.13, FLORIDA STATUTES (1973)

61.13 Custody and support of children, etc., power of court in making orders.—

(1) In a proceeding for dissolution of marriage, the court may at any time order either or both parents owing a duty of support to a child of the marriage to pay such support as from the circumstances of the parties and the nature of the case is equitable. The court initially entering an order requiring one or both parents to make child support payments shall have continuing jurisdiction after the entry of such initial order to modify the amount of the child support payments, or the terms thereof, when such is found to be necessary by the court for the best interests of the child or children, or when such is found to be necessary by the court because there has been a substantial change in the circumstances of the parties. The court initially

entering a child support order shall also have continuing jurisdiction after the entry of such order to require the person or persons awarded custody of the child or children to make a report to the court on terms prescribed by the court as to the expenditure or other disposition of said child support payments.

(2) The court shall award custody and visitation rights of minor children of the parties as a part of proceeding for dissolution of marriage in accordance with the best interests of the child. Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody.

(3) In any proceeding under this chapter, the court, at any stage of the proceeding and after final judgment, may make such orders about what security is to be given for the care, custody, and support of the minor children of the marriage as from the circumstances of the parties and the nature of the case is equitable.

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§61.14, FLORIDA STATUTES (1973)

61.14 Modification of alimony judgments; agreements, etc.—

(1) When the parties have entered into, or hereafter enter into, an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party has changed since the execution of such agreement or the rendition of the order, either party may apply to the circuit court of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for a judgment decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the

changed circumstances and the financial ability of the parties, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order.

(2) When an order is modified pursuant to subsection (1), the party having an obligation to pay shall pay only the amount of support, maintenance, or alimony directed in the new order, and the agreement or earlier order is modified accordingly. No person shall commence, or cause to be commenced, as party or attorney or agent or otherwise, in behalf of either party in any court, an action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance, or alimony otherwise than pursuant to the order.

(3) This section is declaratory of existing public policy and of laws of this state which are hereby confirmed in accordance with the provisions hereof. It is the duty of the circuit court to construe liberally the provisions hereof to effect the purposes hereof.

(4) If a party applies for a reduction of alimony or child support and the circumstances justify the reduction, the court may make the reduction of alimony or child support regardless of whether or not the party applying for it has fully paid the accrued obligations to the other party at the time of the application or at the time of the order of modification.

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§61.17, FLORIDA STATUTES (1973)

61.17 Alimony and child support; additional method for enforcing orders and judgments; costs, expenses.—

(1) An order or judgment for the payment of alimony or child support or either entered by any court of this state may be enforced by another chancery court in this state in the following manner:

(a) The person to whom such alimony or child support is

payable or for whose benefit it is payable may procure a certified copy of the order or judgment and file it with a complaint for enforcement in the circuit court for the county in which the person resides or in the county where the person charged with the payment of the alimony or child support resides or is found.

(b) If the pleadings seek a change in the amount of the alimony or child support money, the court has jurisdiction to adjudicate the application and change the order or judgment. In such event the clerk of the circuit court in which the order is entered changing the original order or judgment shall transmit a certified copy thereof to the court of original jurisdiction, and the new order shall be recorded and filed in the original action and become a part thereof. If the pleadings ask for a modification of the order or judgment, the court may determine that the action should be tried by the court entering the original order or judgment and shall then transfer the action to that court for determination as a part of the original action.

(2) The court in which such an action is brought has jurisdiction to award costs and expenses as are equitable, including the cost of certifying and recording the judgment entered in the action in the court of original jurisdiction and reasonable attorney's fees.